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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| **CREDITORS TRADE ASSOCIATION, INC.,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**ELIBRIUM, LLC, et al.,**<br>**Defendants and Appellants.** | **A105953**<br><br>**(San Mateo County Super. Ct. No. C433707A)** |

Defendants Elibrium, LLC and Sharon Chiu appeal an order denying their motion to set aside and vacate a default judgment in favor of plaintiff Creditors Trade Association (Creditors) on Creditors's action for fraud. Elibrium, LLC and Chiu contend they were not properly served with Creditors's complaint, and there is insufficient evidence of Chiu's individual liability. They also contend the trial court erred in awarding attorney fees to Creditors.

BACKGROUND

On February 5, 2001, ClickAction, Inc., registered a fictitious business name statement for "Elibrium" with the Santa Clara County clerk. Chiu signed the statement as chief financial officer on behalf of ClickAction, Inc. The statement listed Elibrium's mailing address and principal place of business as 2197 East Bayshore Road, Palo Alto (hereafter the Palo Alto address). A fictitious business statement is valid for five years from the date of filing.

Elibrium was a division of ClickAction, Inc. In June 2001, the Elibrium management team bought out the assets of the division and incorporated it as Elibrium, Inc. On June 25, 2001, "Elibrium, Inc." registered a fictitious business name statement for "MySoftware," "Elibrium," and six other fictitious business names with the Santa Clara County clerk. The Palo Alto address was listed as the principal place of business for the fictitious businesses, and "Sharon Chiu, CFO" at the Palo Alto address was listed as the mailing address for Elibrium, Inc., and all the fictitious businesses.

In September 2001, Elibrium, Inc., moved to 2 Waters Park Drive, Suite 150, San Mateo (hereafter the San Mateo address). There is no evidence in the appellate record of a correction to Elibrium, Inc.'s, address on the June 25, 2001 fictitious business statement filed in Santa Clara County or of a new filing in San Mateo County.

Between June and September 2002, Influence Communications, a printing and packaging company, sold approximately $44,000 worth of services and products to "Elibrium" at the San Mateo address.

On December 5, 2002, Elibrium, LLC registered with the California Secretary of State as a foreign limited liability company. It listed the San Mateo address as its principal address, and Chiu, same address, as its agent for service of process.

On January 16, 2003, after "Elibrium" had failed to pay its outstanding obligation, Influence Communications assigned the debt to Creditors, a collection agency, which does business as Great Western Collection Bureau.

On January 20, 2003, Creditors sent "Elibrium" a notice of intent to file suit and incur court costs unless Elibrium made full payment of the $47,721.58 outstanding debt it owed Influence Communications within five days. The figure presumably represented the total amount of the outstanding invoices, $43,633.36, plus prejudgment interest. The notice, sent to the San Mateo address, was on "Great Western Collection Bureau" letterhead. It identified Influence Communications as its "assigner," and instructed Elibrium to make the payment to Great Western. The letter did not refer by name to Creditors or any other parent company of Great Western.

On February 26, 2003, Creditors filed an action against Elibrium, Inc., doing business as Elibrium, and Christina Willett, individually, to recover the debt Influence Communications had assigned to it. (Action 429479, hereafter the first action.) Willett (now Christina Willett Seeyle) was CEO and president of Elibrium, Inc.[1]

On July 14, 2003, a default court judgment of $47,721.58 was entered against Elibrium, Inc., and Willett in the first action, pursuant to Code of Civil Procedure section 585, subdivision (b).[2]

On August 26, 2003, Creditors brought the instant action (action 433707, hereafter the second action) against Elibrium, LLC and Chiu, individually, for fraudulent transfer, misrepresentation and damages. The complaint alleged that Chiu dominated and controlled Elibrium, Inc., and that between June and September 2002, pursuant to an oral contract, she purchased, through Elibrium, Inc., products from Creditors's assignor, Influence Communications, which had not yet been paid, although the debt had been reduced to a judgment on July 14, 2003. The complaint incorporated by reference the same outstanding invoices constituting the debt that formed the basis of the judgment in the first action. The complaint further alleged that Chiu transferred the entity known as Elibrium, Inc., and all its assets to Elibrium, LLC without notice to Elibrium, Inc.'s, creditors in order to hinder creditors, like Creditors, from collecting their claims against Elibrium, Inc. It also alleged that when Chiu ordered the products from Influence Communications, she knew Elibrium, Inc., would not be able to pay for them because she had arranged to dissolve Elibrium, Inc. The complaint prayed that the transfer of Elibrium, Inc., to Elibrium, LLC be set aside and declared void as to Creditors to the

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[1] Creditors filed the first action under the name of Fund Recovery Services, Inc. Elibrium LLC and Chiu do not dispute that Fund Recovery Services and Creditors are the same entity.

[2] Code of Civil Procedure section 585, subdivision (b), provides that, after a defendant has been served other than by publication and has not responded in any way within the permissible time, a plaintiff may apply for entry of default, and may thereafter, apply to the court for the relief demanded in the complaint, which the court may grant after hearing the plaintiff's evidence.

All further section references are to the Code of Civil Procedure.

extent necessary to satisfy Creditors's judgment in the first action; that the court grant a temporary restraining order enjoining Elibrium, LLC from disposing of its business; that the "judgment herein" be declared a lien on Elibrium, LLC's assets; and for an accounting of all profits and proceeds Elibrium, LLC and Chiu earned from the exchange of Elibrium, Inc., to Elibrium, LLC.

Willett, who retained her positions as CEO and president after the formation of Elibrium, LLC, was not a party to the second action.

On September 29, 2003, at 10:10 a.m., according to the proof of service, Kevin Ardoin, a registered California process server, served a summons and complaint for the second action on Elibrium, LLC, doing business as Elibrium, by personally delivering the documents to Chiu, as agent for service, at the Palo Alto address. He simultaneously served the summons and complaint on her individually.

On December 6, 2003, Creditors requested entry of default/court judgment against Elibrium, LLC and Chiu in the amount of $50,150.57: the amount of the first judgment, plus interest, costs, and attorney fees. Creditors's request for entry of judgment was mailed to Elibrium, LLC and Chiu at the Palo Alto address. On December 15, 2003, a court default judgment in the requested amount was entered against Elibrium, LLC and Chiu in the second action.

On January 20, 2004, the court clerk issued a writ of execution for the December 15, 2003 judgment as to Elibrium, LLC and Chiu.

On February 13, 2004, a notice of levy to enforce the December 15, 2003 judgment was delivered to General Bank, Cupertino, where Elibrium, LLC maintains an account. As discussed more fully below, Chiu declared she first learned "about this case" that day, when General Bank telephoned her to say it had been served with a writ of execution and then faxed her a copy of the writ.

On February 19, 2004, Elibrium, LLC and Chiu moved, pursuant to section 473.5, to vacate and set aside the December 15, 2003 default judgment and to recall and quash

the writ of execution and notice of levy on the grounds the judgment was void due to improper service of the summons and complaint.[3]

In support of the motions Chiu declared: She was never served personally or in her capacity as Elibrium, LLC's agent for service of process with a summons and complaint, nor had she received a copy of the summons and complaint from any person. She did not know what "complaints" (*sic*: claims?) Creditors had against Elibrium, LLC or her. Neither she personally nor Elibrium, LLC had any record of any business between Elibrium, LLC and Creditors. Elibrium, LLC's only other officer never received a summons and complaint from Creditors for "this litigation." Chiu is the only Elibrium, LLC employee authorized to accept service of summons.

Creditors opposed the motion of Elibrium, LLC and Chiu on the ground there was no basis to vacate a judgment because, although Chiu denied being served the summons and complaint, she never denied owing the obligation to Influence Communications, nor did she attach a proposed answer to her declaration, as required by section 473, subdivision (b). Alternatively, Creditors requested the court to issue a writ of attachment or temporary protective order to prevent Elibrium, LLC and Chiu from dissipating funds if it vacated the judgment.

In support of Creditors's application for a writ of attachment, Bill Brown, the owner of the original creditor, Influence Communications, declared: before he assigned Elibrium's obligation to Creditors in January 2003, he spoke numerous times to Chiu in

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[3] Section 473.5 states: "(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered. . . . (c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

an attempt to collect the outstanding invoices. Chiu always acknowledged the debt, did not dispute the amount, and promised to pay it "when funding was received by Elibrium."

In further support of Creditors's application, its president, Gary Looney, declared: when Creditors began its collection activity to enforce the July 14, 2003 judgment in the first action against Elibrium, Inc., it discovered that the assets of Elibrium, Inc., had been transferred to Elibrium, LLC between March and April 2003. Creditors then filed the instant second action against Elibrium, LLC and Chiu for fraudulent transfer. Looney "ran" a sales tax permit through the state board of equalization and learned that Elibrium, LLC owned a company named "Mysoftware," located at the San Mateo address. Through further investigation he learned that Elibrium, Inc., owned a fictitious business called "My Software," located at the Palo Alto address. Creditors obtained Elibrium, Inc.'s, 2003 banking records, which disclosed that before Elibrium, Inc.'s, assets were transferred to Elibrium, LLC, Elibrium, Inc.'s, bank accounts contained sufficient funds to pay the outstanding obligation to Influence Communications.

At the March 4, 2004 hearing on these matters, the court concluded Elibrium, LLC and Chiu failed to meet their burden of showing that service was not properly effectuated and denied their motions. It noted specifically their failure to present any explanation concerning their relationship to the Palo Alto address at which the proof of service showed they were served.

Elibrium, LLC and Chiu moved for reconsideration on the grounds that, because they were not permitted to reply to Creditors's opposition, they were unable to present evidence demonstrating that the purported service on Chiu was impossible or to rebut Creditors's "scurrilous" allegations of fraudulent transfer of assets.

In support of the motion for reconsideration Chiu submitted two additional declarations in which she averred: Neither she nor Elibrium, LLC's only other officer was ever served with the summons and complaint that resulted in the July 14, 2003 default judgment in the first action, nor had she ever seen the complaint in the first

action.[4] Elibrium, LLC employs 45 people at its San Mateo headquarters and its Elk Grove warehouse. Chiu could not have been served in Palo Alto on September 29, 2003, because she "[has] not been physically present and working" at the Palo Alto address since Elibrium, Inc., moved to the San Mateo address in September 2001. According to her records for September 29, 2003, she arrived at the San Mateo office at 8:30 a.m., ate lunch in the company lunchroom, and departed after 5:00 p.m. She could be precise about her whereabouts on that date because she reviewed the emails she sent that day, all of which have a time annotation. The Palo Alto address is the location of ClickAction, a completely independent company having no relationship with Elibrium, LLC or Elibrium, Inc. She was never personally served with a summons and complaint either individually or in her capacity as agent for service of process for Elibrium, LLC, never received a copy of the summons and complaint from any person, and as of her March 5, 2004 declaration, had never seen these documents. There was no contract between Elibrium, Inc., and Influence Communications. They transacted some business by issuing purchase orders, but the amount owed Influence Communications was disputed. She could not be more precise about Elibrium, LLC's disputes regarding Influence Communications's claims because "I just learned about [Creditors] and Influence Communications' claims on March 2, 2004. . . ." Because she never heard of Creditors until contacted by Elibrium, LLC's bank on February 13, 2004, she "had no idea upon what basis [Creditors] was claiming that it was owed almost $50,000 from Elibrium LLC."

In opposition to Elibrium, LLC and Chiu's motion for reconsideration, Creditors submitted the declarations of Kevin Ardoin, owner of K&J Process Serving Company, Creditors's president Looney, Creditors's attorney, and Debra Douglas, case administrator for Creditors's attorney's office.

Process server Ardoin declared: On August [*sic*: September] 29, 2003, Creditors's attorney instructed him to serve Elibrium, LLC and Sharon Chiu at the San Mateo

[4] The appellate record contains no documents concerning efforts to vacate the July 14, 2003 judgment in the first action.

address. When he attempted service at this address, he was told that Chiu was not in but was at ClickAction, an affiliated company located at the Palo Alto address. When he arrived at ClickAction's office, Chiu was pointed out to him. She was of Asian descent and approximately 45 years old. He served the summons and complaint on her as an individual and as agent for Elibrium, LLC. His experience with the September 29, 2003 service was "consistent" with his experience on September 12, 2003, when he went to the San Mateo address at Creditors's request to serve an order of examination based on the judgment in the first action. When he attempted to serve Chiu at this address on September 12, he was told she was at a different location.

Creditors's president Looney declared that Creditors ran a credit report on Chiu in February 2004 when it was attempting to collect the outstanding debt to Influence Communication. For privacy purposes he did not attach the report to his declaration, but it disclosed her age as 44 years old.

Creditors's attorney declared that he researched "Elibrium" on the world wide web on February 24, 2004. He attached to his declaration a photocopy of a page from the "Elibrium" web site; the copyright for the site is Elibrium, LLC. The web-site page also includes short biographies of "Elibrium['s] Executive Team;" Chiu is identified as a graduate of National Taiwan University who joined "Elibrium" in 1990 after working at three other computer-related businesses.

Case administrator Douglas declared that Chiu telephoned Creditors's attorney's office on February 13, 2004. Her call was routed to Douglas, to whom she identified herself as from "Elibrium" and said Creditors had attached Elibrium's bank account, and she wanted the levy removed. Douglas explained to Chiu that Creditors had a judgment against Elibrium, LLC, so the levy was valid. Chiu responded that she was aware of Creditors's judgment against Elibrium, Inc., but was unaware of a judgment against Elibrium, LLC as well. When Douglas informed Chiu that the creditor of the judgment against Elibrium, LLC was Influence Communications, Chiu acknowledged knowing about the debt to Influence Communications, but asserted it was the debt of Elibrium, Inc. Douglas then informed Chiu that Creditors had a judgment against both Elibrium,

Inc., and Elibrium, LLC, and that the bank levy would not be released. She suggested Chiu contact her attorney.

At the March 12 hearing on Elibrium, LLC and Chiu's motion for reconsideration, the court granted reconsideration on its own motion based on confusion at the March 4 hearing as a result of an order shortening time. In view of the conflicting declarations of Chiu, who declared she was never served, and process server Ardoin, who declared he served her at the Palo Alto address, the court characterized the matter as a "credibility match." It found the evidence supporting proper service more credible than the evidence attacking the service. It observed that process server Ardoin had no real stake in the case; it did not matter to him whether the December 15, 2003 judgment remained or was set aside. On the other hand, the court noted that Chiu had a bias and self-interest because she had a very important interest in whether the judgment was set aside. Additionally, the court noted that when Chiu telephoned Creditors's attorney on February 13, 2004, to complain about the bank levy, she admitted knowing about a judgment, even though she thought it was against Elibrium, Inc., not Elibrium, LLC.

The court concluded that Elibrium, LLC and Chiu failed to meet their burden of proof to overcome the presumption of proper service demonstrated by Creditors's September 29, 2003 proof of service. It therefore denied Elibrium, LLC and Chiu's motion to vacate and set aside the December 14, 2003 default judgment.

## DISCUSSION

I. *Substantial Evidence of Proper Service*

Elibrium, LLC and Chiu contend the trial court abused its discretion in refusing to set aside the default judgment because they were not properly served.

The party moving for relief from a default judgment bears the burden of establishing the basis for relief. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041.) A motion seeking relief from default lies within the sound discretion of the trial court, and its discretion will not be overturned absent an abuse of discretion. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) Because the law strongly favors trial and disposition

on the merits, orders denying relief are scrutinized more carefully than those granting relief. (*Ibid*.)

Compliance with the statutory procedure for service of process is essential to establish personal jurisdiction; consequently, a default judgment entered against a defendant who was not served according to statute is void. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) A summons may be served by personal delivery of a copy of the summons and complaint to the person to be served. (§ 415.10.) In the case of a limited liability company, a summons may be served in the same manner as a summons served on a corporation. (Corp. Code, § 17061, subd. (a).) A corporation may be served by delivering a copy of the summons and complaint to the person designated as agent for service of process. (§ 416.10, subd. (a).)

When there is substantial conflicting evidence before the trial court as to whether the summons and complaint were properly served, the appellate court will not disturb the trial court's determination of the controverted facts, including its determination of the credibility of witnesses. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.) Here, there is sufficient evidence to support the trial court's implied finding that process server Ardoin was more credible than Chiu.

Ardoin went to Elibrium, LLC's San Mateo address on September 29, 2003, to serve Chiu and was told she was not in at the time but was at an "affiliated" company, ClickAction in Palo Alto. His declaration reasonably implies that he went immediately to the Palo Alto office, a distance, we judicially note, of approximately 13 miles. He impliedly asked for Chiu, because he declared that she was "pointed out" to him, and he then personally served this person, whose race and age, according to Ardoin's description, are consonant with Chiu's. The fact that, to effectuate service, he had to go to an address different from the San Mateo address at which he was instructed to serve her, because she "was not in" at the San Mateo address, comported with his experience two weeks earlier, when he had tried to serve her at the San Mateo address and was also told she was at a different location. Furthermore, it was reasonable for the trial court to infer that if the person pointed out to Ardoin at the Palo Alto office as Chiu had refused

personal delivery of the summons, Ardoin would have had to resort to service by mail (§ 415.20, subd. (a)), and he did not have to do so.

By contrast, there are numerous pieces of evidence from which the trial court could call Chiu's credibility into question. Chiu declared that on September 29, 2003, she arrived at the San Mateo office at 8:30 a.m., ate lunch in the company lunchroom, and departed after 5:00 p.m., implying she did not leave the San Mateo office all day, but she offered no documentation to support this implication. For instance, she asserted that these times are precise because the emails she sent that day bear a time annotation, but she did not attach any emails to her declaration, nor was there a declaration from any other employee of the San Mateo office attesting to her presence through the day. She may have eaten lunch at the San Mateo office, but she could easily have made the 26-mile roundtrip to the Palo Alto office in the middle of the morning.

Chiu declared that service on her at the Palo Alto office was impossible "because I have not been physically present and working" at the Palo Alto office since "we moved to San Mateo in September 2001." The conjunction in her statement--"physically present *and* working"--creates an ambiguity. On the one hand, it suggests she was never physically present for any purpose at all in the Palo Alto office since the September 2001 move. On the other hand, it allows the reasonable inference that, although she may not have performed her professional tasks on behalf of Elibrium, Inc., or Elibrium, LLC at the Palo Alto office after September 2001, she went there for other purposes, such as visiting former colleagues to consult about interests common to their related field of software for small businesses or simply to socialize. This inference is strengthened by the fact that Elibrium, Inc., and its successor, Elibrium, LLC, although separate legal entities from ClickAction since 2001, evolved from ClickAction, where both Chiu and Christina Willett, Elibrium, LLC's president and CEO, had worked as executives for several years before forming Elibrium, Inc. Additionally, there was no evidence that Elibrium, Inc., prior to September 29, 2003, had withdrawn or amended the fictitious business statement it filed in Santa Clara in June 2001 that listed "Elibrium" as a fictitious name at the same Palo Alto address as ClickAction, and fictitious business

name statements are valid for five years. Given this close relationship of the Elibrium entities to ClickAction, the trial court could find it not credible that, in the two years since the move to San Mateo, Chiu was never at the geographically proximate Palo Alto address where her office was once located.

Chiu declared she never heard of "Creditors Trade Association" until notified by the Elibrium, LLC's bank on February 13, 2004 of the writ of execution and only learned about Creditors and Influence Communications's claims on March 2, 2004. However, on January 20, 2003, Creditors's president sent a notice of intent to sue to the San Mateo address. Although the letter used Creditors's business name of Great Western Collection Bureau rather than its corporate name, the letter stated that the business was a collection agency whose assignor was Influence Communications, to whom "Elibrium" owed an outstanding debt of $47,000. Additionally, office manager Douglas declared that Chiu acknowledged during their February 13, 2004 telephone conversation both that Creditors had a judgment against Elibrium, Inc., (i.e., the judgment in the first action) and that she knew Elibrium, Inc., had a debt to Influence Communications. President Brown of Influence Communications also declared that he discussed the outstanding debt several times with Chiu before assigning it to Creditors, and Chiu never questioned the amount.

The inconsistencies, lack of precise detail, and implausibilities in Chiu's declarations, and the diametrical contradiction between her statements and those of process server Ardoin who did not have a financial or personal stake in whether the December 2003 default judgment was set aside, constituted sufficient evidence to support the court's finding that Chiu, who, by contrast, has a very strong bias and self-interest in having the judgment set aside, was less credible as to her claim of improper service than Ardoin's assertion of proper service.[5]

[5] On March 12, 2004, the trial court, on its own motion, granted reconsideration of its March 4, 2004 denial of Elibrium LLC and Chiu's motion to vacate, and, after further hearing, again denied their motion. Thereafter, Elibrium, Inc., and Christina Willett brought a motion to vacate and set aside the July 14, 2003 default judgment against them in the first action on the grounds of improper service. Their motion was granted on July 7, 2004, by a judge different from the one who determined defendants' motion.

II. *Valid Declarations*

Elibrium, LLC and Chiu contend that the several declarations submitted by Creditors to support its opposition to their motion for relief from default were inadmissible because the declarations were not executed under penalty of perjury. Elibrium, LLC and Chiu acknowledge they are making this contention for the first time on appeal, but argue their failure to object below does not constitute waiver because the defect in the declarations is not merely technical.

Declarations are the accepted form of evidence in motion proceedings. (*Kulshrestha v. First Union Commercial Corp*. (2004) 33 Cal.4th 601, 609; Cal. Rules of Court, rule 323(a).) Section 2015.5 permits a person to prove a matter "by the unsworn . . . declaration . . . in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution. . . ." The purpose of permitting declarations under penalty of perjury, in lieu of sworn statements, is to help ensure that the declaration contains a truthful factual representation and is made in good faith. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223.)

The declarations submitted on Creditors's behalf all conclude with the statement "I declare that the foregoing is true and correct and that this declaration was signed on [specified date] at [designated California city]" and are signed by the declarants, but they do not include the phrase "under penalty of perjury." Contrary to Elibrium, LLC and

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Elibrium LLC and Chiu requested us to take judicial notice of all trial court records filed in conjunction with the Elibrium, Inc./Willett motion and the July 7, 2004 order itself. We deferred ruling on their request until ruling on the merits of the present appeal. We now decline their request. The appellate court's review is limited to and based on the record that resulted in the order from which the appeal is taken, not pleadings filed and evidence developed subsequent to that order and heard by a different judge(s). (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) Although appellate courts have made an exception to this rule when postjudgment events cause issues to become moot, e.g., death of a party, change in legislation (*ibid*.), the exception is inapplicable here where the later order granting relief from the default judgment in the first action was based on a wholly different evidentiary record.

Chiu's argument, the requirement that a written declaration supporting (or opposing) a motion be signed under penalty of perjury is waived on appeal if not presented as an issue to the trial court. (Evid. Code, § 353, subd. (a); *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 648.) To hold otherwise would be unfair to the trial court and the adverse party. (*Doers v. Golden Gate Bridge, Etc. Dist* (1979) 23 Cal.3d 180, 184.)

III. *Judgment against Chiu*

Elibrium, LLC and Chiu's motion to vacate was based, in part, on their contention that the default judgment against Chiu individually was void because she was protected by Elibrium, LLC's shield against personal liability. On appeal Chiu contends the court erred in denying the motion to vacate as to her because there was no proof of her individual liability, and the complaint contains no allegations supporting alter ego liability for her.

Chiu's argument to the trial court was, in substance, a challenge to the adequacy of Creditors's pleadings. She was essentially challenging Creditors's complaint as failing to allege facts sufficient to constitute a cause of action against her individually. However, given the status of the action, her argument must fail. She lacked standing to make this argument until the action was reinstated. '"A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings . . . ."' (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc*. (1984) 155 Cal.App.3d 381, 385-386.) The court properly disregarded Chiu's inadequate pleading argument in determining whether to grant or deny Creditors's motion to vacate.

Chiu's contention relies on *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207. In *Sheard*, plaintiff brought an action against a Wisconsin corporation and 75 Does. (*Id*. at p. 209.) He also served five individual directors and owners of the corporation as Does One through Five in the complaint. (*Id*. at pp. 209, 211.) The individuals moved to quash on the grounds the court had no personal jurisdiction over them because they were Wisconsin residents with no connection to California. (*Id*. at pp. 209, 211.) *Sheard* agreed and directed the trial court to quash the summons because the complaint otherwise

contained no allegations that sought to impose liability on the individuals on an alter ego theory. (*Id*. at pp. 212-213.)

As an action in a wholly different procedural posture from the instant case, *Sheard* does not assist Chiu. *Sheard* involved the threshold steps in prosecuting a civil action, unlike the present case in which there is a final judgment.

IV. *Attorney Fees*

Elibrium, LLC and Chiu contend the trial court erred in awarding Creditors $660 in attorney fees as part of the December 15, 2003 default judgment. They did not raise this issue below, and issues not raised in the trial court cannot generally be raised for the first time on appeal. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279.)

Furthermore, Creditors's complaint specifically prayed for attorney fees pursuant to Civil Code section 1717.5, which provides that in any action on a contract based on a book account which does not provide for attorney fees, the prevailing party shall be entitled to reasonable attorney fees, which shall be fixed by the court not to exceed the lesser of $660 or 25 percent of the principal obligation owed under the contract. A book account is a detailed statement that constitutes the principal record of transactions between a debtor and creditor arising out of a contract, shows the debits and credits connected therewith and the entities against and in favor of whom entries are made, is entered in the regular course of business as conducted by the creditor, and is kept in a reasonably permanent form. (§ 337a.) The gravamen of Creditors's complaint was Elibrium, LLC and Chiu's breach of an oral contract with Influence Communications, manifested by regularly maintained invoices, which were incorporated by reference into the complaint. In its justification for filing its complaint outside small claims court, Creditors also incorporated by reference a spread sheet of Influence Communications's accounts payable. The court could reasonably construe these documents as evidence of a book account. Section 1033.5, subdivision (a)(10(B) permits, as an award of costs, attorney fees authorized by statute. The attorney fees awarded in the default judgment were permitted by statute in this action on a book account.

## DISPOSITION

The order denying the motion of Elibrium, LLC and Chiu to vacate the default judgment is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Gemello, J.